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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 471.

ILLINOIS COMMERCE COMMISSION, ET AL., *Petitioners*,

v.

BOARD OF TRADE OF THE CITY OF CHICAGO, *Respondent*.

BRIEF FILED ON BEHALF OF THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS, AS AMICUS CURIAE, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

FREDERICK G. HAMLEY
JOHN E. BENTON
Attorneys for National Association of Railroad and Utilities Commissioners
7413 New Post Office Bldg.
I. C. C. Section
Washington 25, D. C.

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OPINION BELOW.

The opinion of the Circuit Court of Appeals for the Seventh Circuit is reported in 156 Fed. 2d, page 33.

PRELIMINARY STATEMENT.

The National Association of Railroad and Utilities Commissioners is a voluntary association embracing within its membership the members of the regulatory commissions and boards of the several states of the United States except two, one of which has no state regulatory commission.

By the constitution of the Association, the President of the Association may direct the General Solicitor to appear on behalf of the Association (as distinguished from a particular commission represented in its membership) in any proceeding pending before any court or commission in which, in the judgment of such President, appearance on behalf of the Association should be made. This brief is offered for filing on behalf of said Association by direction of the President, in the general public interest.

STATEMENT OF THE CASE.

The Illinois Commerce Commission (hereinafter called the Commission), one of the petitioners herein, is an agency of state government of the State of Illinois, existing under the provisions of the laws of the State of Illinois, and having jurisdiction over public utility companies, including warehousemen, and over boards of exchange, operating within that state.

The respondent, a corporation by legislative act of the Illinois State Legislature approved February 18, 1859, is a commercial grain exchange situated in the City of Chicago. The activities of said Board of Trade, hereinafter sometimes called the Board, are subject to federal regulation under the Commodity Exchange Act (act of June 15, 1936, c. 545, 49 U. S. Stat. 1491, 7 U. S. C. 1-17 a). The Secretary of Agriculture has, under this act, designated the Board as a contract market.

Daniel F. Rice & Company (hereinafter called Rice), an Illinois partnership, is an owner, shipper and dealer in grain in the State of Illinois. In the course of its business, Rice makes use of warehouses situated in Chicago, which warehouses are also used by the members of the Board in the course of their business as grain exchange merchants. All of the warehouses so used by members of the Board are affected by and subject to certain rules and regulations prescribed by the Board.

On July 28, 1944, Rice filed with the Commission a complaint against the respondent in this case, and the respondents (Chicago warehousemen) in No. 470, October Term, 1946, alleging, as to the respondent herein, failure to comply with the Illinois Grain Warehouse Act of the State of Illinois.

In paragraph 15 of the Rice complaint it is charged that the rules and regulations pertaining to grain warehousemen, adopted by respondent, are uncertain, incomplete and ambiguous in their coverage, favor warehousemen and sellers of grain, and discriminate against grain buyers, and in many other respects are unreasonable and unsatisfactory. Paragraph 16 of the Rice complaint alleges that respondent has adopted rules and regulations relating to warehousing of grain without securing the approval of the Commission, as required by section 194b of the Illinois Grain Warehouse Act. The prayer of the Rice complaint asks the Commission to declare inoperative and void respondent's rules which have not received prior approval of the Commission, and to require the respondent to adopt and submit for approval, rules and regulations which are fair, equitable, adequate and specific. (R. 17-19)

On August 31, 1944, respondent filed with the Commission a motion that it be dismissed from the proceedings on jurisdictional grounds. The specific grounds for dismissal, as stated in this motion, were: (1) that the Commodity Exchange Act and the regulations of the Secretary of Agriculture, hereinafter called the Secretary, issued thereunder, supersede and nullify the Constitution of the State of Illinois and all laws, statutes and ordinances of the State of Illinois and all orders and regulations of the Commission with respect to the operations of respondent as a contract market; and (2) that the Commission has no jurisdiction with respect to named warehouses affected by respondent's rules and regulations for the reason that these warehouses operate under federal licenses issued under the United States Warehouse Act, as to which the

Constitution and all laws of the State of Illinois pertaining to warehouse regulation have been superseded. (R. 20-24)

On October 10, 1944, the Commission entered its order denying respondent's motion that it be dismissed from the proceeding and setting the cause for hearing before it on October 24, 1944. (R. 27) The respondents in this case and in No. 470, thereupon filed in the District Court of the United States for the Northern District of Illinois, Eastern Division, separate complaints for the purpose of enjoining Rice from the further prosecution of its proceeding before the Commission; of enjoining the Commission from entertaining further jurisdiction in the matter; and the Attorney General of the State of Illinois from instituting any proceeding against respondents for the purpose of enforcing any order of the Commission in the Rice proceeding. (R. 3-15)

The defendants named in the respondent's complaint filed answers and motions to strike the complaint and dismiss the cause. (R. 36, 40, 43) The two causes were consolidated for hearing in the trial Court and, on June 26, 1945, that court entered a single order, dismissing both causes of action. (R. 91) Upon separate appeals to the Seventh Circuit Court of Appeals, the order of the trial court was reversed. (R. 126) The Commission and the Attorney General of the State of Illinois, and Rice, have filed here their petitions for a writ of certiorari to review the decision of the Seventh Circuit Court of Appeals.

REASONS FOR GRANTING THE WRIT.

(1) The state authority sought to be exercised with respect to respondent Board of Trade is in aid of the state's general authority and duty to regulate public grain warehousemen. Assuming that state jurisdiction to regulate federally-licensed warehousemen will be sustained in the companion case, *Illinois Commerce Commission* v. *Great Lakes Elevator Corporation*, No. 470, such jurisdiction cannot be effectively exercised if board of trade rules and

regulations pertaining to grain warehousemen are held to be exempt from state supervision. Moreover, board of trade rules and regulations apply to state-licensed warehousemen as well as those which are federally licensed. Thus, even if it is held, in the companion case, that the state may not regulate federally-licensed warehouses, state regulation of the specified board rules and regulations is necessary and proper in connection with the state's regulation of state-licensed warehousemen.

(2) The Court below held that state supervision of board of trade rules and regulations relating to warehousing of grain, under section 194b of the state statute, had been wholly superseded. Yet the Commodity Exchange Act touches upon such rules and regulations in only three particulars, and provides no federal regulation or control whatever with respect to the great body of board rules and regulations relating to warehousing of grain. The effect of the decision of the Court below is therefore to create a hiatus in regulation, relieving boards of exchange operating under the Commodity Exchange Act from any regulation with respect to most of their rules and regulations pertaining to the warehousing of grain.

(3) This case is closely related to the companion case, No. 470, and if a writ of certiorari is granted in either case it should be granted in both. Both cases arose as a result of a single complaint filed with the Commission. The Commission, the trial Court, and the Circuit Court of Appeals each consolidated the two cases for purposes of hearing and decided the two cases in a single opinion. There is an intermingling of both parties and issues, and reversal of either case alone would produce an anomalous situation and afford petitioners inadequate relief.

(4) The question at issue here relates to the construction of the Constitution and federal statutes. Unless and until put to rest by this Court, this question will undoubtedly be the source of further litigation in other states, involving other boards of trade and grain exchanges. The principle

of constitutional law applied by the Court below—supersedure of state authority by virtue of the Supremacy Clause—is always destructive of state and local authority. Unless its application shall be restricted to cases where the national interest is vitally affected, state and local government will be seriously weakened and undermined without compensating benefit to the nation. This Court should now, in this and the companion case, reaffirm, for the benefit of all other federal and state courts, the policy of judicial restraint which has characterized this Court's application of the supersedure principle.

THE QUESTION PRESENTED.

While there are a number of procedural questions involved in this case, the issue of prime importance, in so far as the general public interest is concerned, is the Constitutional issue of supersedure of state authority. For this reason the brief of this *amicus curiae* is filed in support of the following proposition:

> The federal government has not, by legislation, preempted the matter of regulating board of trade rules and regulations so as to deprive the Commission of its authority with respect thereto.

SUMMARY OF ARGUMENT.

I. (pages 9 to 26). The state here is not attempting to regulate boards of trade in any general or comprehensive manner. It only seeks, pursuant to its general regulatory authority over public grain warehousemen, to approve or disapprove board rules relating to the warehousing of grain. The exercise of this limited state authority will not conflict with federal regulation under the Commodity Exchange Act. There are only four provisions of that act which expressly, or by implication, can be said to refer to board rules and regulations relating to warehousing of grain. These are section 5a(1), (3), (6) and (7). Accord-

ingly, if any conflict between state authority and particular provisions of the Commodity Exchange Act are to be found, it must be with respect to these four subsections of the federal act.

Section 5a(1) provides only that all board rules and regulations must be filed with the Secretary. This subsection gives the Secretary no power or duty to approve, disapprove, prescribe or in any way question or revise such rules. If the board rules so filed indicate that there has been a failure to comply with some other provision of the act, then the Secretary can invoke his enforcement powers. But such action would be based upon those other features of the act and not upon any authority conferred by section 5a(1). Accordingly, section 5a(1) cannot, in and of itself, be the source of any conflict between state and federal regulation.

Section 5a(3) requires boards of trade to promulgate rules requiring warehousemen to make reports, keep records, and permit such warehouse visitation as the Secretary may prescribe. No issue raised by the Rice complaint has the remotest connection with or raises the slightest question regarding rules complying with section 5a(3). While the state statute requires that such a rule receive Commission approval, the possibility that the Commission would disapprove such a rule is extremely remote, and wholly foreign to the issues raised by the Rice complaint. There are numerous board rules relating to the warehousing of grain which would be subject to Commission surveillance under section 194b. Of all these, only two or three rules are made in compliance with the federal act (section 5a(3), (6) and (7)). As to all the others, there being no federal statutory requirement, no possibility of conflict exists.

The state ought not to be denied the right to exercise authority with respect to all of these other rules pertaining to warehousing of grain, solely because there are three such rules where it is possible to imagine conflict. The

true question is not whether the state statute *might* be so administered as to give rise to conflict, but whether it *is* being so administered here. *Allen-Bradley Local* v. *Wisconsin E. Rel. Bd.*, 315 U. S. 740, 750. *Watson* v. *Buck*, 313 U. S. 387, 401.

For the same reasons noted above, section 5a(6) and (7) poses no question of conflict requiring supersedure of state authority under section 194b. Respondent invites the Court to go searching for conflict among hypothetical cases depicting possible Commission action and expressly designed to develop conflict. This Court, in cases referred to above, has made it clear that it will not indulge in guesswork of this kind. At this stage of the proceeding there is no showing of direct and irreconcilable conflict between state action under section 194b, and federal regulation under the Commodity Exchange Act.

II. (Pages 26 to 34). The Commodity Exchange Act does not supply comprehensive and all-inclusive federal regulation of boards of trade. Accordingly that act manifests no Congressional intent wholly to exclude the state. The federal act is primarily concerned with a limited activity of boards of trade, namely, futures transactions, as distinguished from cash transactions. *Dickson* v. *Uhlmann Grain Co.*, 288 U. S. 188, 198; *Board of Trade* v. *Olsen*, 262 U. S. 1, 36. Futures transactions actually constitute only a small fraction of the activity of boards of exchange. The application of the Commodity Exchange Act to boards of trade is also limited in many other respects.

It is a cardinal principle of law applicable to supersedure cases that the failure of Congress to occupy the entire field is not to be taken as an intention to require that the unoccupied portion remain unregulated, and so to preclude all state authority. *Kelly* v. *Washington*, 302 U. S. 1, 9. Section 12 of the act, authorizing the Secretary to cooperate with state officials, shows that Congress contemplated the continued exercise of state authority. This Court attaches great significance to such provisions in

supersedure cases. *Townsend* v. *Yeomans*, 301 U. S. 441, 454; *Union Brokerage Company* v. *Jensen*, 322 U. S. 202, 209. The respondent Board of Trade has heretofore, on numerous occasions and in several respects, recognized the continued validity of state regulation under section 194b.

III. (Pages 34 to 39). The United States Warehouse Act does not preclude the exercise of state authority over board of trade rules and regulations relating to warehousing of grain. This question is fully discussed in the brief of *amicus curiae*, filed in the companion case, *Illinois Commerce Commission* v. *Great Lakes Elevator Corporation*, No. 470, October Term, 1946. A summary of that argument is set forth herein.

ARGUMENT.

I.

Regulation Under the Illinois State Statute Pertaining to Boards of Trade Will Not Conflict with Federal Regulation Under the Commodity Exchange Act.

The state commission does not claim general regulatory jurisdiction over boards of trade, but only the power to disapprove board rules and regulations relating to warehousing of grain.

The first step in considering any supersedure case is to determine the scope of the state authority said to be superseded.

In the instant case this is a very simple process. There is only one provision of the Illinois statutes which authorizes any state regulation of boards of trade or grain exchanges. This provision, which is a part of the Illinois Grain Warehouse Act, reads as follows:

> "194b. Rules of board of trade or grain exchange to be approved. Sec. 6b. No rule or regulation of any board of trade or grain exchange *which relates to the warehousing of grain* in any public grain warehouse, or which relates to the custody of grain in any private

warehouse, or the use or negotiation of custodian's receipts for such grain, shall be or become operative until such rule or regulation *is approved* by the Illinois Commerce Commission, and the Illinois Commerce Commission may adopt and promulgate reasonable rules and regulations consistent with the provisions of this Act for the purpose of making this Act effective. (Added by act approved July 14, 1927, L. 1927, p. 711)."[1]

It will be observed that this state regulatory statute is extremely limited in scope. It does not attempt to regulate boards of trade as such, but only to the extent that such boards influence and affect the functioning of grain warehouses. Its only purpose is to make more effective and complete the comprehensive regulation of public grain warehousemen which has been an important function of Illinois state government since *Munn* v. *Illinois*, decided in 1877.

Accordingly, Section 194b confers no authority upon the state agency to supervise and control board[2] practices, examine books, require reports, or to regulate boards in any other respect except as to their rules and regulations. It does not confer general authority with respect to *all* board rules and regulations, but *only* as to those which relate to the warehousing of grain. It does not authorize the state commission to prescribe rules and regulations relating to the warehousing of grain, but only to *approve or disapprove* such rules and regulations prepared and submitted by the board.

The fact that the state statute in question is of limited scope and has only restricted application to respondent Board of Trade is an important circumstance to be considered in determining whether that statute has been superseded. The more limited the operation of the state

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[1] Emphasis here, and elsewhere in this brief, is supplied.

[2] In this brief the term "board" will sometimes be used instead of "board of trade" or "grain exchange".

statute, the less likelihood of conflict with express provisions of the federal act and the less likelihood of repugnance to the policy of Congress. That the Court takes note of this circumstance is indicated by what was said, in *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148, following a review of prior decisions holding against supersedure:

> "... In all of these, however, it was the ruling of this Court that the federal enactment was consistent with the *narrow regulation sought to be enforced by the state* so that the state enactment did not stand 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' Hines v. Davidowitz, 312 U. S. 52, 67 ..." (page 157)

Respondent asserted in the Court below that the Rice complaint invokes Commission action beyond that authorized by the state statute quoted above, in that it asks the Commission to declare inoperative, respondent's rules and regulations governing its maintenance as a commercial grain exchange. (R. 17) Since the Commission refused to dismiss the Rice complaint, respondent argues that the Commission asserts jurisdiction to grant all the relief prayed for, including that not authorized by any statute and, accordingly, supersedure here is to be judged not by the scope of the state statute, but by the scope of the Rice complaint.

The respondent's appraisal of the Rice complaint may or may not be correct. It is obvious, however, that the Commission's refusal to dismiss the Rice complaint implies only that the Commission asserts *some* jurisdiction, and can grant *some* relief, with respect to the items in the complaint, including those relating to respondent Board of Trade. If the Commission has *any* jurisdiction with respect to respondent's rules and regulations, there was no alternative but to deny the motion to dismiss the complaint. In the Court below the Commission expressly acknowledged that the Commission's only authority with

respect to respondent was that conferred by Section 194b of the State Warehouse Act, quoted above, and further acknowledged that, under that statute the Commission may only disapprove rules which the Board of Trade itself initiates.

Had the Commission not expressly acknowledged that its authority is limited to the matter of approving rules and regulations relating to the warehousing of grain, still the Court would determine the question of supersedure on the basis of that limited statutory authority. This is true for the reason that the Court will not assume that an agency of government will exceed its own statutory authority.

If it later transpires that the agency exceeds its authority, then the act of doing so will be clearly invalid under state law and may also be invalid because in conflict with federal statutes or Congressional policy. Those questions, however, are to be dealt with when they arise, and not in advance, as respondent here asks the Court to do. As the Court said, in *W. W. Cargill Co.* v. *Minn. ex rel. Railroad and W. Com.*, 180 U. S. 452, in rejecting the contention that state warehouse regulation should be enjoined because it *might* be administered in an unconstitutional manner:

> "... If the commission refused to grant a license, or if it sought to revoke one granted, because the applicant in the one case, or the licensee in the other, refused to comply with statutory provisions or with rules or regulations inconsistent with the Constitution of the United States, the rights of the applicant or the licensee could be protected and enforced by appropriate judicial proceedings." (page 468)

The question here is not supersedure of state laws purporting to extend general regulatory controls to boards of trade, but supersedure of a single state statutory provision, enacted with the purpose of perfecting state warehouse regulation, empowering the Commission to dis-

approve board rules and regulations relating to warehousing of grain.

The limited state authority respecting board rules and regulations will not conflict with regulation under applicable provisions of the federal act.

At a later point in this brief it will be appropriate to review the general scope of the Commodity Exchange Act. But since the present inquiry is whether there is a conflict between particular provisions of the federal and state acts, we need now only consider the individual sections of the federal act bearing upon, or affecting, the specific and limited kind of regulation covered by the state statute.

As indicated in the foregoing section of this brief, the only state authority here in question is that single provision of the state statute empowering the Commission to disapprove board rules and regulations relating to warehousing of grain. In order to determine whether administration of that state statute is in conflict with federal regulation under the Commodity Exchange Act, it is necessary to examine every provision of the federal act directly or indirectly pertaining to the same subject of regulation—board rules and regulations relating to warehousing of grain.

Warehouses are specifically referred to in only two places in the Commodity Exchange Act—that is, in section 5a(3) and (7).

Section 5a(3) requires boards of trade to require warehouses out of which commodities are deliverable on futures contracts to make reports and keep records and permit visitation, as prescribed by the Secretary.

Section 5a(7) requires boards of trade to declare federally-licensed warehousemen regular for futures deliveries, irrespective of the possession of state licenses, "without discrimination," provided such warehouses meet reasonable requirements as to accessibility and suitability.

A third provision of the federal act—section 5a(6)—while not specifically referring to warehouses, relates so directly to warehouse operations that it may be considered as pertinent here. This provision makes it the duty of boards of trade to require that contracts of sale of any commodity for future delivery shall provide for the delivery of commodities of grades conforming to United States standards, if such standards shall have been promulgated.

None of the three provisions referred to above specifically require promulgation of board "rules and regulations." But they are open to such an interpretation and will be so construed for the purposes of this brief.

A fourth provision of the federal act does refer specifically to board rules and regulations and is sufficiently broad to include rules and regulations relating to the warehousing of grain. This is section 5a(1), requiring boards to furnish the Secretary of Agriculture with copies of all their rules and regulations.

There are other provisions of the Commodity Exchange Act placing a duty on boards of exchange respecting their rules and regulations. For example, boards are prohibited from having a rule or regulation which forbids the return of patronage dividends or the payment of commodity-unit compensation to cooperative members (sections 5(e) and 6a(2)). And, under section 4a(1), boards are required to adopt rules making effective the limits set by the Secretary of Agriculture on the amount of trading. But none of these other statutory provisions pertaining to rules and regulations relate in any way, directly or indirectly, to rules regarding the warehousing of grain—which is the narrow field of state authority in question here.

It follows from what is said above that, if there is any conflict here with the particular provisions of the federal act, calling for supersedure of state authority, it must be because of one or more of the only four provisions of the Commodity Exchange Act dealing with board rules re-

lating to warehousing of grain—section 5a(1), (3), (6) or (7). Accordingly these four provisions will be considered separately below.

Section 5a(1)

This provision of the Commodity Exchange Act reads as follows:

> "(Each contract market shall) Promptly furnish the Secretary of Agriculture copies of all bylaws, rules, regulations, and resolutions made or issued by it or by the governing board thereof or any committee, and of all changes and proposed changes therein; ..."

It will be observed that this provision gives the Secretary no power and confers upon him no duty to approve, disapprove, prescribe or in any way question or revise such rules. Nor does it contain any requirement regarding the contents or subject matter of rules and regulations which are filed, or require that rules be adopted covering a particular matter.

The only purpose of this provision is to furnish the Secretary with information from which it can be determined whether the board is complying with the mandatory features of the act. Hence if the board rules filed with the Secretary disclose non-compliance with the three provisions specifically relating to warehousing of grain (section 5a(3), (6) and (7)), then the Secretary may act, under the enforcement provisions of the act.

But, as to board rules relating to warehousing of grain, but not violating the three provisions last referred to, the Secretary has no duty or power whatever, except to receive and file such rules. For example, if a board rule relates to warehouse rates, then, since the Commodity Exchange Act places no duty upon boards respecting such a rule, the Secretary has no supervisory power over that rule although, as indicated above, the rule must be filed with

the Secretary. It is therefore apparent that section 5a(1), requiring the filing of all board rules and regulations adds nothing to the Secretary's regulatory powers over such rules.

Accordingly, section 5a(1) cannot, in and of itself, be the source of any conflict between state and federal regulation. If the state, exercising authority under section 194b of the state statute, disapproves any present board rule relating to warehouses, that action conflicts in no way with the requirement of the federal act that all board rules and regulations be filed with the Secretary. The most that could happen under an exercise of state authority would be to make it necessary for a board to file a revised rule or regulation with the Secretary. This, likewise, would conflict in no way with section 5a(1), since that subsection expressly provides for the filing of changes and proposed changes.

If the revised rule relates to any of the matters touched upon in section 5a(3), (6) or (7), the Secretary may be called upon to act. But such action would be taken because of the duty placed upon the Secretary by those other subsections, (to be hereinafter discussed) and not because of any duty conferred by section 5a(1) now under consideration.

The only possibility of conflict between state authority and federal regulation under section 5a(1) would be if the state ordered boards of exchange to discontinue the practice of filing copies of rules and regulations with the Secretary. But the Rice complaint does not ask for any such action and the state statute does not authorize the entry of any such order. The Commission's only authority under section 194b of the state statute is to approve board rules and regulations relating to the warehousing of grain.

In view of the foregoing, it must be concluded that there is no conflict with federal regulation under section 5a(1) of the Commodity Exchange Act which calls for supersedure of the state authority invoked and sought to be exercised in the Rice proceeding.

Section 5a(3)

The pertinent language of this sub-section reads as follows:

> "(Each contract market shall) Require the operators of warehouses in which or out of which any commodity is deliverable on any contract for future delivery made on or subject to the rules of such contract market, to make such reports, keep such records, and permit such warehouse visitation as the Secretary of Agriculture may prescribe . . ."

In the administration of this subsection, the Secretary of Agriculture has promulgated a regulation (Reg. Sec. 1.44) which has been summarized by respondent in these words:

> Section 1.44 requires each contract market to require the operators of warehouses whose receipts are deliverable in satisfaction of commodity futures contracts made on or subject to the rules of such contract market to keep records and (c) "to permit visitation of the premises and inspection of the books and records of such warehouses by duly authorized representatives of the United States Department of Agriculture or the Department of Justice." This regulation applies not only to federally-licensed warehouses, but to all warehouses made regular by the rules of the Board of Trade, including those warehouses licensed by the state, and shows that in so far as the Commodity Exchange Act is concerned the activities of such state licensed warehouses are under the visitorial scrutiny of the Secretary of Agriculture. Federal, state or private warehouses must, in order that grain stored therein may be deliverable in satisfaction of futures contracts, *comply with the provisions of Board of Trade rules required under this regulation of the Secretary of Agriculture.*

It will be noted that this statutory provision and applicable regulation provide only that boards of trade shall require that designated warehouses shall (1) keep records;

and (2) permit visitation of the premises and inspection of the books and records of such warehouses.[3]

No issue raised by the Rice complaint, relating to respondent Board of Trade's rules and regulations, has the remotest connection with or raises the slightest question regarding rules requiring designated warehousemen to keep records, or rules permitting visitation of the premises and inspection of the books and records of such warehouses. As set forth in paragraph 15 of the Rice complaint, the criticism made of the board's rules pertaining to warehousemen concerns entirely different matters, to-wit:

> "... These rules and regulations should be such as to promote the principles of justice and equity in the purchase, sale and delivery of grain in the Chicago terminal market. In fact, however, the Rules and Regulations adopted by the Chicago Board of Trade are uncertain, incomplete and ambiguous in their cover-

[3] While it is assumed, for the purposes of this brief, that compliance with these requirements calls for issuance of board rules and regulations covering those points, it would appear, in so far as disclosed by the record herein, that the respondent Board of Trade has not issued regulations fully and specifically dealing with these matters. Board Regulation 1632 (R. 157) requires warehousemen to accord every facility to any duly authorized committee for the examination of their books and records, for the purpose of ascertaining the stocks of all kinds of grain which may be on hand at any time. This may be taken as an adequate rule requiring the keeping of books and records, except that it does not require that they be kept for at least three years, as provided in section 5a(3). But there appears to be no Board rule specifically requiring designated warehousemen to permit visitation of the premises and inspection of the books and records by representatives of the Department of Agriculture, as provided in section 5a(3) and the Secretary's regulation, section 1.44.

However, there are some general Board regulations requiring Board members to comply with all lawful provisions of the Grain Futures Act and regulations thereunder (Reg. 603, R. 118), and requiring parent warehouse corporations to guarantee operation of subsidiary warehouses in conformance with the laws of the United States (Reg. 1621-A, R.155), which may, for present purposes, be taken as complying with the requirement of section 5a(3) and the Secretary's regulation 1.44.

> age, favor warehousemen and the sellers of grain, and discriminate against grain buyers, and in many other respects are unreasonable and unsatisfactory." (R. 17)

Should the Commission disapprove respondent's existing rules with respect to every matter complained of above, it would not be called upon to disapprove, in any respect, the particular rules provided for in section 5a(3) of the federal statute and section 1.44 of the Secretary's regulations.

Paragraph 16 of the Rice complaint alleges that, during the last ten years the Board has adopted new rules and regulations relating to the public warehousing of grain and the custody of grain in private warehouses, without securing the approval of the Commission. Paragraph (i) of the prayer of the Rice complaint asks the Commission to:

> "Declare inoperative and void such rules and regulations of the Chicago Board of Trade, or amendments thereto, which have not received prior approval of the Illinois Commerce Commission, and further require said Chicago Board of Trade to adopt and submit for approval, rules and regulations which are fair, equitable, adequate and specific." (R. 19)

The broad language of paragraph 16 of the Rice complaint, and of paragraph (i) of the prayer thereof, quoted above, would extend to and include Board rules, made in compliance with section 5a(3), requiring warehousemen to keep records, make reports and permit visitation by representatives of the Secretary of Agriculture, assuming such rules have been made during the last ten years and have not already been approved by the Commission.

It may be contended, therefore, that conflict may arise either (1) because of a Commission order declaring "inoperative and void," the Board's rules made in compliance with section 5a(3), thus leaving the Board with no rule on the subject; or (2) because of a Commission order disap-

proving portions of a Board rule deemed essential to compliance with section 5a(3).

Conceding that either action by the Commission would produce direct conflict with the federal act, it is submitted that the likelihood thereof is extremely remote and wholly foreign to the issues raised by the Rice complaint, and that supersedure should not be based upon speculation of this character.

Despite the broad language of paragraph 16 and the quoted portion of the prayer, it is apparent from a reading of the complaint, especially paragraph 15, quoted above, that Rice is not interested in invalidation or revision of Board rules requiring warehousemen to keep records and permit visitation by the Secretary.

But irrespective of what Rice is seeking, the Court ought not to assume that the Commission will exercise its authority in a manner which will produce direct conflict of this kind. Unless it can be said that any exercise whatever of state authority here will produce direct conflict with federal regulation, supersedure is not called for.

As previously pointed out, state authority is limited to the single matter of board rules and regulations pertaining to warehousing of grain, and so does not trench upon federal regulation in the general area covered by the Commodity Exchange Act. But, with respect to that one subject of state regulation, it is clear that there is a considerable area for the exercise of state authority without involving the slightest encroachment of regulation under the Commodity Exchange Act. There are numerous rules directly affecting or pertaining to the warehousing of grain. Eighteen such regulations (R. 155-159) are set forth in Chapter 33 of the Board Regulations entitled "Regulations Relating to Warehousing of Grain." Other Board regulations pertaining to warehousing are to be found in Chapter 10, entitled "Deliveries of Commodities" (R. 96-106) and Chapter 27, entitled "Regulations Relating to the Custodian Department" (R. 139-143). Of all these regulations,

only two or three are made in compliance with the federal act—section 5a(3), (6) and (7)—and as to all the others, there being no federal statutory requirement, no possibility of conflict exists.

The state ought not to be denied the right to exercise authority with respect to all of these other rules and regulations solely because, with respect to two or three individual rules, it might be possible for state action to come into conflict with federal regulation. If such cases arise, the Court can deal with them at that time, and the integrity and supremacy of federal authority will be fully protected. Until such a case does arise, as evidenced by a Commission order actually precipitating conflict, the state ought not, by this blanket injunction, be denied the right of functioning in this regulatory field where there is no possibility of conflict.

The true question here is not whether the State statute *might* be so administered as to give rise to conflict, but whether it *is* being so administered here. As this Court said, in *Allen-Bradley Local* v. *Wisconsin* E. Rel. Bd., 315 U. S. 740, holding that supersedure had not occurred:

> ". . . Section 10 (of the National Labor Relations Act) grants the federal board 'exclusive' power of enforcement. It is not sufficient, however, to show that the state Act *might* be so construed and applied as to dilute, impair, or defeat those rights. Watson v. Buck, 313 U. S. 387 . . ." (page 750)

Here the Commission has been given no opportunity to show the manner in which it will exercise its authority under section 194b of the state statute. The Court should not be asked to guess how such authority will be exercised when the state has an opportunity to do so. Above all, the Court should not be asked to guess that the state, having a substantial field for non-conflicting and hence permissible action, will choose to assure the invalidity of its own acts by precipitating a head-on collision with federal regulation in

the very limited portion of that field where conflict may be remotely possible.

In *Watson* v. *Buck*, 313 U. S. 387, this Court indicated that it will not indulge in guesswork of this kind. It was there said:

> "... No one can foresee the varying applications of these separate provisions which conceivably might be made. A law which is constitutional as applied in one manner may still contravene the Constitution as applied in another. Since all contingencies of attempted enforcement cannot be envisioned in advance of those applications, courts have in the main found it wiser to delay passing upon the constitutionality of all the separate phases of a comprehensive statute until faced with cases involving particular provisions as specifically applied to persons who claim to be injured. Passing upon the possible significance of the manifold provisions of a broad statute in advance of efforts to apply the separate provisions is analogous to rendering an advisory opinion upon a statute or a declaratory judgment upon a hypothetical case. It is of course conceivable that a statute might be flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it. It is sufficient to say that the statutes before us are not of this type. Cases under the separate sections and paragraphs of the acts can be tried as they arise—preferably in the state courts. Any federal questions that are properly presented can then be brought here ..." (page 401)

To the same effect see: *Terminal R. Assoc.* v. *Brotherhood of R. Trainmen*, 318 U. S. 1, 6, and *W. W. Cargill* v. *Minn. ex rel. Railroad and W. Com.*, *supra*, quoted earlier in this brief.

Section 5a(6)

This subsection of the Commodity Exchange Act reads as follows:

> "(Each contract market shall) Require that all contracts of sale of any commodity for future delivery on such contract market shall provide for the delivery thereunder of commodities of grades conforming to United States standards, if such standards shall have been officially promulgated; . . ."

In compliance with this provision of the federal act, the Board has promulgated Rule 295 (R. 103) which is substantially in the words of the statute. The rule, however, adds the provision that:

> ". . . If no such United States grades shall have been officially promulgated, then such contract shall be performed on the basis of the grades established by the rules of the Division of Grain Inspection of the Department of Agriculture of the State of Illinois in force at the time of the making of the contract."

Everything which has been said above respecting Board rules made in compliance with section 5a(8), is equally applicable to this rule, made in compliance with section 5a(6). No allegation of the Rice complaint criticises the content of this Board rule. There is not the slightest basis for concluding that this rule would be disapproved by the state and that a revised rule, eliminating provisions necessary for compliance with section 5a(6) would be ordered.

If anything of this nature did happen, then would be the time for the Court to act. In the meantime, the state should be left undisturbed in its exercise of authority respecting numerous board rules pertaining to warehouses which are entirely free of regulatory control under the federal act.

Section 5a(7)

This is the third and last provision of the federal act affirmatively providing for the content of Board rules pertaining to warehouses. The pertinent language of this subsection reads as follows:

> "(Each contract market shall) Require that receipts issued under sections 241-273 of this title (United

States Warehouse Act) shall be accepted in satisfaction of any futures contract, made on or subject to the rules of such contract market, without discrimination and notwithstanding that the warehouseman issuing such receipts is not also licensed as a warehouseman under the laws of any State or enjoys other or different privileges than under State law; ..."

Conforming to this statutory requirement, the Board has adopted Regulation 1829 (R. 180) reading as follows:

> "In compliance with Section 5a, sub-paragraph (7) of the Commodity Exchange Act, receipts for grain stored in the following grain elevators licensed under the United States Warehouse Act of August 11, 1916, as amended will be deliverable in satisfaction of futures contracts:
>
> Wabash Elevator operated by Morris Grain Company, Chicago & Northwestern Terminal Elevator & Annex operated by Cargill, Inc., Rock Island Terminal Elevators C and D operated by Continental Grain Co., National Elevator, operated by Great Lakes Elevator Corporation, Calumet Elevator operated by Rosenbaum Brothers, Inc., Santa Fe Elevator operated by Santa Fe Elevator Corporation, and Rialto Elevator operated by General Mills, Inc. Star Grain Division." (R. 180-181)

What is said above, in connection with the discussion of section 5a(3) and (6) is equally applicable here. Because of the same circumstances, and for the same reasons, the Court should not now say, in advance of action by the Commission, that the exercise of its authority under section 194b will conflict with, and is therefore superseded by, section 5a(7), requiring the Board regulation quoted above.

The respondent suggested, in its brief filed in the Court below, that the Commission could, under the state statute, require the Board to refuse to accept from federally licensed warehouses, receipts in satisfaction of futures contracts unless they were also licensed by the State of Illinois. Since this would be contrary to section 5a(7) and Board reg-

ulation 1829, promulgated thereunder, respondent states that it would then either have to refuse to comply with the order of the Commission or comply with it and then violate the Commodity Exchange Act, a dilemma subjecting respondent to penalties under either the federal or state acts.

The answer to this suggestion, provided by this Court in *Watson* v. *Buck, Terminal R. Assoc.* v. *Brotherhood of R. Trainmen*, and *W. W. Cargill* v. *Minn., ex rel. Railroad and W. Com.*, already referred to, is that *if* the state precipitates such a conflict, the Court can *then* fully safeguard federal authority, but that the Court will not assume, in advance, that the state will so act. In this day when federal legislation extends to almost every phase of the economy and touches almost every activity of the people, few general state regulatory statutes could survive the challenge of supersedure if they were required to withstand the test of every imaginable hypothetical case which could be designed to show conflict.

Summary on the question of conflict between particular provisions of federal and state statutes.

The only authority here sought to be exercised by the state is the approval or disapproval of board rules and regulations relating to the warehousing of grain. The respondent Board has many rules and regulations directly or indirectly relating to warehousing of grain. But of all those Board rules and regulations only three, made in compliance with section 5a(3), (6) and (7)—can be said to be made in compliance with provisions of the Commodity Exchange Act. As to all the others, the Board is completely free and clear of federal supervision.

The Board rules made in compliance with section 5a(3), (6) and (7) are not criticised in the Rice complaint and are therefore not likely to be dealt with at all in the Commission proceeding, except possibly for the formality of granting Commission approval thereof. If the Commission should disapprove any of these few Board rules required by

the federal act, and so bring about a conflict between federal and state authority, the Court can at that time act to safeguard federal supremacy. Such supremacy is not threatened now. Respondent invites the Court to go searching for conflict among hypothetical cases depicting possible Commission action and expressly designed to develop a conflict. This Court, in cases referred to above, has made it clear that it will not indulge in guesswork as to possible future state action, but will judge each case as it arises and will, in the meantime, leave the states undisturbed in the exercise of their proper powers.

At this stage of this proceeding, there is no showing of direct and irreconcilable conflict between state action under section 194b, and federal regulation under the Commodity Exchange Act.

II.

The Commodity Exchange Act Does Not Completely, Fully and Exclusively Control and Cover the Activities of Boards of Trade.

It is well settled that supersedure can occur only where there is an irreconcilable conflict between the particular provisions of the federal and state statutes, or where the state statute plainly and palpably infringes the policy of Congress. This principle was announced by the Court as early as 1859, in deciding *Sinnot* v. *Davenport*, 22 How. (U. S.) 227, 243. Is was there said:

> "We agree, that in the application of this principle of supremacy of an Act of Congress in a case where the state law is but an exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two Acts could not be reconciled or consistently stand together; . . ." (page 247)

The same view was reaffirmed in the recent case of *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 766, where the Court said:

> "Congress, in enacting legislation within its constitutional authority over interstate commerce, will not be deemed to have intended to strike down a state statute designed to protect the health and safety of the public unless its purpose to do so is clearly manifested, . . . or unless the state law, in terms or in its practical administration, conflicts with the Act of Congress, or plainly and palpably infringes its policy."

In the preceding section of this brief it has been shown that there is no irreconcilable conflict between the proposed state regulation of board of trade rules relating to the warehousing of grain, and the particular provisions of the Commodity Exchange Act. There is now to be considered the question of whether, even though there be no direct conflict of particular provisions of the two acts, the state act "plainly and palpably" infringes the policy of Congress expressed in the Commodity Exchange Act.

Where there is no conflict of specific provisions, such infringement of federal policy could only take place if Congress has expressly, or impliedly—by supplying comprehensive and all-inclusive federal regulation—manifested a plain intent wholly to exclude state regulation. There is no contention that the Commodity Exchange Act contains any express language excluding state regulation of board rules relating to the warehousing of grain. If any infringement of Congressional policy is to be found, therefore, it must be on the ground that the Commodity Exchange Act supplies comprehensive and all-inclusive federal regulation of boards of trade, thereby manifesting, by implication, a Congressional intent to exclude the states.

It does not require an extensive analysis of the Commodity Exchange Act to reveal that this legislation does not supply complete, full and exclusive controls covering the activities of boards of trade. The act is primarily concerned with a limited activity of boards of trade, namely, futures transactions, as distinguished from cash transactions. This is clearly indicated by section 3 of the act, setting forth the importance and evils of futures transactions

and the need of establishing controls regarding such transactions. This section reads in part as follows:

> "Transactions in commodity involving the sale thereof for future delivery as commonly conducted on boards of trade and known as 'futures' are affected with a national public interest; . . . the transactions and prices of commodity on such boards of trade are susceptible to speculation, manipulation, and control, and sudden or unreasonable fluctuations in the prices thereof frequently occur as a result of such speculation, . . ."

Congress sought, in this act, to overcome these evils by prohibiting all futures trading except where executed through registered futures commission merchants and floor brokers trading on boards of trade designated as contract markets by the Secretary of Agriculture. In addition, sections 4, 4a, and 4b of the act prohibit a variety of specific manipulative devices or practices in futures transactions that have led to excess speculation.

The act makes some references to cash transactions, including section 2(a), definition of terms; and sections 5(a), and 5(b) relating to the designation of a board of trade as a contract market. But these references are, in most cases, for the purpose of supplying the Secretary with information and otherwise to assist in the control of futures trading, and not because cash transactions are subjected to comprehensive regulation. There is a limited amount of regulation of cash grain transactions but again, such regulation is mostly incidental to and in aid of the primary objective, regulation of dealings in "futures."

That the primary purpose of the Commodity Exchange Act is to regulate futures transactions, is indicated by what the Court said in *Dickson* v. *Uhlmann Grain Co.*, 288 U. S. 188, referring to the Grain Futures Act (now Commodity Exchange Act). It was there said:

> ". . . The purpose of the Grain Futures Act was to control the evils of manipulation of prices in grain.

> Such manipulation, Congress found, was effected through dealings in grain futures. . . . It set up a system of regulation and prohibited all future trading which did not comply with the regulations prescribed. . . ." (page 198)

Likewise, in *Board of Trade* v. *Olsen*, 262 U. S. 1, 36, it was said:

> ". . . It is not the sales and deliveries of the actual grain which are the chief subject of the supervision of Federal agency by Congress in the Grain Futures Act, although a record of cash sales is required, and a corner in cash sales would be a violation of it, and there are other provisions equally regulatory of them. It is the contracts of sales of grain for future delivery, most of which do not result in actual delivery, but are settled by offsetting them with other contracts of the same kind, or by what is called 'ringing.' . . ."

See, also, *State* v. *Christopher*, 318 Mo. 225, 2 S. W. (2d) 621.

Yet, while the Commodity Exchange Act is primarily concerned with the regulation of futures trading, transactions of this character actually constitute only a small fraction of the activity of boards of exchange. As this Court said, in *Board of Trade* v. *Olsen, supra*, upholding the constitutionality of the Grain Futures Act:

> "The Chicago Board of Trade is the greatest grain market in the world. . . . (The) great annual flow (of grain into the Chicago market) is made up of the cash grain sold on the exchange, the cash sales to arrive . . ., and the comparatively small percentage of grain contracted to be sold in the futures market not settled by offsetting. . . ." (page 33)

The application of the Commodity Exchange Act to boards of trade is also limited in many other respects. For example, that act provides no federal regulation of sales of cash commodity for deferred shipment or delivery, this character of transaction being specifically excepted in the

definition of the term "future delivery," contained in section 2a. The trifling reference to and indirect regulation of grain warehouses provided by section 5a(3), (6) and (7), discussed at length in the first section of this brief, is confined, by the wording of those subsections, to warehouses that have been declared "regular for futures delivery," under board of trade rules and regulations. The Act provides for no control of the custody of grain in private warehouses.

From what is said above it is evident that the Commodity Exchange Act was not intended, and is not administered, as a means of over-all general regulation of boards of trade and of warehouses utilized in connection therewith. It is limited, in most respects, to the supervision and control of futures transactions by such boards, and in many important respects provides no federal regulation whatever. It must be concluded that there remains a large field of board of trade regulation, including supervision of board rules and regulations pertaining to the warehousing of grain, which has been left wholly unoccupied by Congress.

It has long been recognized as a cardinal principle of the law applicable to supersedure cases that the failure of Congress to occupy the entire field is not to be taken as an intention to require that the unoccupied portion remain unregulated, and so to preclude all State authority. This principle was well stated by this Court in *Kelly* v. *Washington*, 302 U. S. 1, holding that federal statutes and regulations relating to motor-driven tugs, being limited in scope, did not preclude non-conflicting state regulation thereof. The Court said:

> "Under our constitutional system, there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. Minnesota Rate Cases (Simpson v. Shepard) . . . States are thus enabled to deal with local exigencies and to exert in the absence of conflict with federal legislation an essential protective power. And when Congress does exercise its paramount au-

thority, it is obvious that Congress may determine how far its regulation shall go. There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced. The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by Federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.' " (page 9)

The contention that the Commodity Exchange Act manifests a Congressional intent wholly to preclude state regulation is negatived not only by the limited scope of that act, but by several express provisions therein contained.

Section 12 of the act provides as follows:

"Sec. 12. The Secretary of Agriculture may cooperate with any department or agency of the Government, any State, Territory, District, or possession, or department, agency, or political subdivision thereof, or any person; . . ."

If state regulation had been wholly excluded there would be no room or occasion for cooperation. Section 12 shows that Congress contemplated the continued exercise of state authority over boards of trade and made provision for harmonizing and integrating federal and state administration. The Court has heretofore indicated the significance it attaches to provisions calling for cooperation with state officials. In *Townsend* v. *Yeomans*, 301 U. S. 441, it was said:

". . . Instead of frustrating the operation of such state laws (Georgia law fixing maximum charges for handling and selling leaf tobacco), the provisions of the Act expressly afforded and emphasized the opportunity for cooperation with the States in protecting the farmers' interests. In this view we find no ground for

> the contention that Congress has taken possession of the field of regulation to the exclusion of state laws which do not conflict with its own requirements." (page 454)

See, also, *Union Brokerage Company* v. *Jensen*, 322 U. S. 202, 209.

At the conclusion of section 4c of the Commodity Exchange Act, this language appears:

> ". . . Nothing in this section or section 4b shall be construed to impair any State law applicable to any transaction enumerated or described in such sections."

The respondent, in the Court below, took the position that this express reservation of state authority, being limited to the subject matter of the two indicated sections of the federal act, implied that, as to all other sections thereof, state authority had been superseded.

Acually the reverse is true. The quoted language reserving state authority was for the purpose of preventing supersedure as to the subject matter of sections 4b and 4c, *even where there was direct overlapping or conflict between federal and state laws.* Those two sections specify various types of transactions, such as bucketing orders, wash sales, and fictitious sales, as being "unlawful" under the federal act. Transactions of this nature are also unlawful under the criminal statutes of many states. Since the state statutes deal with precisely the same subject matter, there would be conflict and inevitable supersedure in the absence of a Congressional declaration of the character quoted above.

But no such declaration is necessary to prevent supersedure where there is no direct conflict between state and federal regulations, and so Congress made none. As previously noted, in the absence of a Congressional declaration, supersedure can occur only where the state authority "conflicts with the Act of Congress, or plainly and palpably infringes its policy." *Southern Pacific Co.* v. *Arizona, supra,*

page 766. When Congress uses this much care in preserving state authority even where there is conflict, it seems obvious that, where conflict is absent, Congress meant to leave state authority undisturbed.

In connection with the question of whether the Commodity Exchange Act was intended to oust the states of all jurisdiction, it is pertinent to note that respondent Board of Trade has heretofore, on numerous occasions and in several respects, recognized the continued validity of state regulation under section 194b, and state regulation of federally-licensed warehousemen.

Thus the Board's regulation 1620 provides that storage rates on grain in bulk shall not exceed 1¼ cents per bushel for the first ten days or part thereof. (R. 155) The purpose of this regulation, as respondent itself told the Court below, was to state (and therefore recognize) the Illinois statutes fixing maximum elevation and storage rates.

Board regulation 1623 provides:

> "Any regular warehouse may be declared to be irregular by the Board at any time for violation of the laws of Illinois or the Rules or Regulations of the Association." (R. 156)

In numerous cases, extending from 1931 to 1941, the respondent has submitted to the jurisdiction of the Commission. These cases are Illinois Commerce Commission Docket Nos. 22440 and 22441, order entered in 1933; 22680, orders issued Oct. 27 and Nov. 16, 1933; 23116, orders issued July 12, 1934, May 18, 1937 and Aug. 13, 1941; 23125, order issued in July, 1934; 25215, order issued on Dec. 15, 1936.

Paragraph 3 of respondent's motion filed with the Commission to dismiss the Rice complaint, contains this statement:

> "3. *While this defendant has always complied with Section 194b of the Illinois Grain Warehouse Act* (An Act to regulate public warehouses, etc., approved April 25, 1871 as amended, Chap. 141, Sections 189-221, Illinois Revised Statutes) *and has always complied in all*

respects with the laws of the State of Illinois and the orders of this Commission, nevertheless this action requires this defendant to assert, as it here asserts, that said Commodity Exchange Act and the regulations of the Secretary issued thereunder supersede and nullify the constitution of the State of Illinois and all laws, statutes and ordinances of the State of Illinois and all orders and regulations of this Commission with respect to the operations of this defendant as a contract market, . . ." (R. 21)

These manifestations of previous acquiescence in and, indeed, affirmative utilization and application of, state authority may not work an estoppel against respondent's contrary contention here. But the merit and soundness of respondent's supersedure argument here can hardly help but be affected by the knowledge that, in the past, when it was an advantage to respondent, state authority was acknowledged and made use of. Confronted now with the Rice complaint, charging numerous inequitable and unfair practices subject to state scrutiny under the same state statutory authority, respondent has suddenly discovered that this field of regulation has been precluded by the federal act—an act which itself affords no protection to the public with respect to the matters here complained of.

III.

The United States Warehouse Act Does Not Preclude the Exercise of State Authoity Over Board of Trade Rules and Regulations Relating to Warehousing of Grain.

The respondent contended, in the Court below, that the exercise of state authority pursuant to section 194b of the state statute has been precluded not only by the Commodity Exchange Act, but also by the United States Warehouse Act.

The question of supersedure as a result of enactment of the Commodity Exchange Act has been discussed in the foregoing section of this brief. The question of supersedure

as a result of enactment of the United States Warehouse Act is the principal issue in the companion case, *Illinois Commerce Commission* v. *Great Lakes Elevator Corporation*, No. 470, October Term, 1946. This *amicus curiae* has filed a brief in that case, in support of the petition for writ of certiorari, in which the question of supersedure by reason of the United States Warehouse Act is discussed at length. There is summarized below the argument there made on this question.

I. Beginning with *Munn* v. *Illinois*, 94 U. S. 113, the regulation of public warehousemen has become a traditional function of state government. Because of this, the principles of supersedure should be strictly applied here in favor of continued validity of state authority. The problem is to ascertain the intention of Congress. But, in supersedure cases it is uniformly held that the purpose of Congress to supersede is not lightly to be inferred, but the intention to do so must definitely and clearly appear. *Allen-Bradley Local* v. *Wisconsin E. Rel. Bd.*, 315 U. S. 740, 749. The presumption favors continued validity of state authority. *Reid* v. *Colorado*, 187 U. S. 137, 153. Supersedure can occur only where there is an irreconcilable conflict between the particular provisions of the federal and state statutes, or where the state statute plainly and palpably infringes the policy of a federal act. *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 766.

II. The Rice complaint, which led the Commission to institute this proceeding, sought relief under nine separate and distinct provisions of the Illinois statutes. The injunction prevents the Commission from considering any one of these nine items. If, therefore, it can be established that the Commission's jurisdiction has not been superseded with respect to any one or more items, then granting the injunction was clearly erroneous. It is true that, unless the entire state statute is sustained, there is the possibility that the validated portions may not be considered severable from those which are held to be superseded. But this Court will not

determine, in the first instance, whether a comprehensive state statute is severable. *Watson* v. *Buck*, 313 U. S. 387. Nor will the Court look, for supersedure, among state statutes which have not been applied. *Allen-Bradley Local* v. *Wisconsin E. Rel. Bd. supra.* As yet, the Commission has been given no opportunity to apply any provision of the state statutes to these respondents.

The rate regulatory provisions of the Illinois statute, invoked by Rice, do not conflict with the Secretary's limited functions respecting rates. The Rice complaint asks the Commission to prescribe just, reasonable and non-discriminatory rates. The Secretary has only power to revoke licenses because of unreasonable rates, and to require that warehouse rates be filed and posted. The mere acceptance of a schedule of rates for filing does not imply that they have been approved. *Interstate Commerce Commission* v. *Cincinnati etc. R. Co.*, 167 U. S. 479, 504. It cannot be assumed that a state agency will violate its statutory duty by prescribing unreasonable or extortionate rates. If the Secretary finds state-prescribed rates to be unreasonable, the warehouseman may nevertheless continue to charge such rates by giving up his permissive federal license. But if it is the intent of the Warehouse Act that a licensee may not be compelled, by state action, to follow a course which compels revocation of the federal license, still no conflict with the state's general rate regulation is involved. Under the *Shreveport* doctrine, no requirement under the Warehouse Act can conflict with normal state regulation. Nor, under the principles of supersedure, is the Court required to anticipate every possibility of invalid action by the State. *W. W. Cargill Co.* v. *Minn. ex rel. Railroad and W. Com.*, 180 U. S. 452, 468. The *Hefley* case (158 U. S. 98), relied upon by respondents, is not in point, for it involved interstate railroad rates, and the federal and state statutes there in question prescribed conflicting rules covering precisely the same matter.

The provisions of the Illinois statutes relating to discriminatory and preferential practices, do not conflict with the

federal act. Section 18 of the federal act, requiring warehouse receipts to disclose whether the warehouseman has stored his own grain, does not authorize or approve the practice or preclude a state from prohibiting the practice. The proviso to Section 18 indicates that Congress acknowledged the continued operation of state laws pertaining to grain stored in federally-licensed warehouses. A similar provision in another federal statute has been held not to preclude state laws on the subject. *Dickson* v. *Uhlmann Grain Co.*, 288 U. S. 188. Enforcement of the state prohibition against such practice would not invalidate outstanding warehouse receipts, for the state orders and penalties would run against the warehouseman—there is no provision for confiscation of the grain.

The provisions of the Illinois statute respecting contracts between affiliates or with other public utilities, and respecting issuance of securities, do not conflict with the federal act. The federal act gives the Secretary no express authority as to these matters. The *Cloverleaf* case (315 U. S. 148) does not support the view that the Secretary has implied power to deal with these matters, since there the Court found the State act to be in conflict with the federal agency's expressly conferred powers.

State control of these contracts and security issues, would not conflict with any other function or power of the Secretary. Respondent's proposition that no state or local law must be permitted to affect construction projects required by the Secretary, would nullify zoning ordinances, fire and building codes, and Blue Sky laws, along with the state powers here in question. The only possibility of conflict envisaged by respondents involves a hypothetical case of the most imaginative character. The true question is not whether the state act *might* be so administered as to give rise to conflict, but whether it *is* being so administered here. *Terminal R. Assoc.* v. *Brotherhood of R. Trainmen*, 318 U. S. 1.

III. The Illinois statutes regulating warehouses do not infringe the policy of the United States Warehouse Act.

As a general rule, the failure of Congress to occupy the entire field is not to be taken as an intention to require that the unoccupied portion remain unregulated. *Kelly* v. *Washington*, 302 U. S. 1. As originally enacted in 1916, the federal act was not intended to supersede all state regulation. The act was limited in scope to the establishment of a federal system of warehouse receipts, so that agricultural products could have value as collateral. This is indicated not only by an analysis of the statute, but also by examination of the legislative history.

The 1931 amendment did not change the scope of the act, but made federal action "exclusive" within the limited field covered by the original act. This is indicated by the language of the act. Amended section 29 still provides for cooperation with the states, and "Where the Government has provided for collaboration the courts should not find conflict." *Union Brokerage Company* v. *Jensen*, 322 U. S. 202. That the 1931 amendment of Section 29 did not operate to supersede all state regulation applicable to federally-licensed warehousemen is also indicated by the legislative history, and by what this Court said in *United States* v. *Hastings*, 296 U. S. 188. Like conclusions, for like reasons, must be drawn regarding the 1931 amendment of section 6.

In considering this whole question of state infringement upon a policy of Congress; great weight must be given to the fact that we are here dealing with a long-exercised function of state government. *Davies Warehouse Co.* v. *Bowles*, 321 U. S. 144.

IV. The Supreme Court cases holding that supersedure has occurred are clearly distinguishable. Most of these decisions involve matters which, unlike warehouse regulation, have been customarily controlled at the national level. Where preemption has been found in a field theretofore open to state regulation, this has been due to a conflict of precise regulations or a clash between the policy of the federal and state acts, both of which are lacking in the

nstant case. *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 48, although clearly distinguishable from the present case, epresents about the farthermost point the Court has indicated a willingness to go in finding supersedure. This ase turned on a five to four decision and the essence of he views expressed in the dissenting opinion (and much of he exact language) became the majority opinion a year ater, in *Penn Dairies* v. *Milk Control Com.*, 318 U. S. 261.

CONCLUSION.

The petitions for the writ of certiorari should be granted.

Respectfully submitted,

FREDERICK G. HAMLEY
JOHN E. BENTON
Attorneys for National Association of Railroad and Utilities Commissioners
7413 New Post Office Bldg.
Washington 25, D. C.

eptember 20, 1946.

SUPREME COURT OF THE UNITED STATES

Nos. 471 and 473.—October Term, 1946.

Daniel F. Rice, Joseph J. Rice, et al., etc., Petitioners, 471 *v.* Board of Trade of the City of Chicago, a Corporation, Illinois Commerce Commission, et al., Petitioners, 473 *v.* Board of Trade of the City of Chicago, a Corporation.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[May 5, 1947.]

Mr. Justice Douglas delivered the opinion of the Court.

These are companion cases to *Rice* v. *Santa Fe Elevator Corp.*, and *Illinois Commerce Commission* v. *Santa Fe Elevator Corp., ante*, p. —, decided this day. Respondent in these cases, the Chicago Board of Trade, was joined as a defendant in the proceeding brought by Rice before the Illinois Commerce Commission. As we have noted in our opinion in the companion cases, the Rice complaint charged the defendant warehousemen with maintaining excessive, unreasonable and discriminatory rates and practices, with operating inadequate and unsafe facilities and services, and with failure to comply with other requirements of Illinois law. The Board of Trade, organized under a special Act of the Illinois legislature, operates a commercial grain exchange and has adopted rules and regulations governing transactions on the exchange. The complaint of Rice charges (1) that the rules and regulations of the Board are unreasonable and unsatisfactory in that, among other things, they favor warehousemen and sellers of grain and discriminate against grain buyers; and (2) that the Board

has from time to time adopted rules and regulations, relating to the warehousing of grain in public warehouses and the custody of grain in private warehouses without securing the prior approval of the Illinois Commission. Under Illinois law, it is alleged, such rules may not become operative without approval by the Commission; and the Commission in turn has authority to adopt and promulgate rules of its own. Ill. Rev. Stat. 1945, ch. 114, § 194b.[1] Relief asked on this phase of the proceeding was a declaration that the Board's rules, which did not have the prior approval of the Commission, were void; and an order that the Board adopt and submit rules which were fair, equitable, adequate and specific.

The Board moved to dismiss the proceeding before the Commission on the ground that the Commodity Exchange Act, 49 Stat. 1491, as amended, 7 U. S. C. § 1 *et seq.*, and the regulations thereunder superseded the provisions of Illinois law which Rice sought to invoke. That motion was denied. Thereupon, these suits were instituted in the District Court to enjoin the proceedings before the Illinois Commerce Commission. The District Court dismissed the complaints. The Circuit Court of Appeals reversed. 156 F. 2d 33. The cases are here on certiorari.

The Chicago Board of Trade is "the greatest grain market in the world." *Board of Trade* v. *Olsen*, 262 U. S. 1, 33. Its activities have been regulated by Congress by the Future Trading Act, 42 Stat. 187, by the Grain Futures Act, 42 Stat. 998, and by the Commodity Exchange Act. See H. R. Rep. No. 421, 74th Cong., 1st Sess.

[1] That section provides: "No rule or regulation of any board of trade or grain exchange which relates to the warehousing of grain in any public grain warehouse, or which relates to the custody of grain in any private warehouse, or the use or negotiation of custodian's receipts for such grain, shall be or become operative until such rule or regulation is approved by the Illinois Commerce Commission, and the Illinois Commerce Commission may adopt and promulgate reasonable rules and regulations consistent with the provisions of this Act for the purpose of making this Act effective."

The Board of Trade claims a status under the Commodity Exchange Act which, it is contended, precludes the Illinois Commission from entertaining the Rice complaint.

The Commodity Exchange Act provides comprehensive regulation of trading in futures on commodity exchanges which are designated as "contract markets" by the Secretary of Agriculture. The Secretary is authorized to designate any board of trade as a contract market on its compliance with prescribed terms and conditions. § 5. The Chicago Board of Trade has been so designated. The Act contemplates that each contract market will adopt rules governing transactions in futures contracts. Approval of a board of trade as a contract market may be made only when "the governing board thereof provides for the prevention of manipulation of prices and the cornering of any commodity by the dealers or operators upon such board." § 5 (d). The Act contains provisions which prohibit certain types of trading practices (see for example §§ 4b, 4c, 4h) and other provisions (as for example those dealing with excessive speculation, see § 4a) which limit or control buying and selling on contract markets. But we are not particularly concerned with those phases of the federal regulatory scheme. So far as the problem of supersedure is concerned, this Act is unlike the one considered in the companion cases, as we shall see. Moreover, the subject matter of the complaint filed by Rice with the Illinois Commission against the Board of Trade relates only to the warehousing of grain. On that matter the Act has only two specific provisions.

It provides in the first place that receipts issued under the United States Warehouse Act, 39 Stat. 486, as amended, 7 U. S. C. § 241 *et seq.*, shall be accepted without discrimination in satisfaction of futures contracts made on or subject to the rules of the contract market, even though the warehouseman is not also licensed under state law or enjoys different privileges than those accorded by state law, provided *inter alia*, that "the warehouse in

which the commodity is stored meets such reasonable requirements as may be imposed by such contract market on other warehouses as to location, accessibility, and suitability for warehousing and delivery purposes." § 5a (7). Moreover, each contract market has some control over warehouses in which or out of which any commodity is deliverable on any contract for future delivery made on or subject to the rules of the contract market. Thus the contract market must require the warehouse operators "to make such reports, keep such records, and permit such warehouse visitation" as the Secretary may prescribe. § 5a (3). All rules and regulations of a contract market, and all changes and proposed changes, must be filed with the Secretary. § 5a (1).

Enough of the Act has been summarized to show that it imposes on contract markets, under the supervision of the Secretary, (1) duties of preventing or controlling certain trading practices and of supervising transactions in futures contracts, and (2) some responsibility for standardizing deliverable warehouse receipts and assuring their integrity. The failure or refusal of a board of trade to comply with the provisions of the Act or any of the rules and regulations of the Secretary is cause for suspension or revocation of the authority of the board to act as a contract market. § 5b. And see § 6 (a). Criminal penalties are provided for certain violations of the Act, or of rules or regulations of the Secretary, by a board of trade or any of its directors, officers, agents or employees. §§ 6b, 9. The Secretary has the power to "make such investigations as he may deem necessary to ascertain the facts regarding the operations of boards of trade. . . ." § 8. And the Secretary is given broad rule making powers. § 8a (5).

The Secretary has promulgated numerous rules and regulations covering a variety of subjects pertaining to contract markets and their activities.[2] The following are

[2] The rules and regulations are to be found in 17 C. F. R., Part I.

relevant here since they relate to the warehousing of grain: (1) a requirement that each contract market file information concerning warehouses in which or out of which commodities are deliverable in satisfaction of futures contracts made on the contract market, § 1.43; and (2) a provision that each contract market shall require operators of warehouses whose receipts are deliverable in satisfaction of futures contracts made on or subject to the rules of the contract market (a) to keep specified records, (b) to furnish information concerning stocks of commodities in warehouses, (c) to permit visitation of the premises and inspection of the books and records by duly authorized representatives of the Federal Government. § 1.44.

In pursuance of the latter regulation of the Secretary, the Board of Trade enacted the rules and regulations which Rice challenged in the proceedings before the Illinois Commission. One rule provides that deliveries shall be made by delivery of warehouse receipts issued by warehouses which have been declared "regular" by the Board. Rule 281. The Board's regulations relating to warehousing of grain set forth the procedure and standards by which warehouses may be made "regular." [3]

It is apparent that the federal scheme of regulation of futures trading extends to the whole futures contract—

[3] These regulations provide, *inter alia*, that the warehouses must be "conveniently approachable by vessels of ordinary draft", have "customary shipping facilities", and charge rates not exceeding a specified maximum (Reg. 1620); must file a bond satisfactory to the Board (Reg. 1621); must have proprietors or managers in "unquestioned good financial standing and credit" (Reg. 1624); must be connected by railroad tracks with one or more of the eastern railway lines" (Reg. 1625); and must be "provided with modern improvements and appliances for the convenient and expeditious receiving, handling, and shipping of grain in bulk." (Reg. 1626).

Any "regular" warehouse may be declared "irregular" by the Board at any time for violation of the laws of Illinois or the rules and regulations of the Board (Reg. 1623), or because of any important change in the conditions of any warehouse or disregard or evasion of the requirements governing regular warehouses (Reg. 1629).

to its satisfaction, as well as to its execution. It is also apparent that the Act provides some control over (1) warehouse receipts which are acceptable in satisfaction of sales and purchases on the contract market, and (2) the qualifications of the warehouses whose receipts will be accepted for such deliveries. But there is not contained in the Commodity Exchange Act, as there is in the United States Warehouse Act, see *Rice* v. *Santa Fe Elevator Corp., supra,* a declaration by Congress that the system which it has adopted for the regulation of trading on contract markets is exclusive of state regulation. Here Congress has gone no further than to write into the Act prohibitions and controls and to give the force of law both to them and to rules and regulations of the Secretary made within the scope of his statutory authority. With exceptions which we will note, state regulations which conflict with the requirements of the Act or with the rules and regulations of the Secretary would be superseded under the familiar rule.

Congress treated the rules and regulations of the Board of Trade differently from those of the Secretary. It did not undertake to put behind them civil or criminal sanctions.[4] It merely furnished standards (or authorized the Secretary to do so) to which the rules and regulations of the Board were to conform. And while there is provision in some instances for disapproval of the Board's rules by the Secretary of Agriculture (see § 4c), there is no provision for his approval or disapproval of the rules challenged in the Illinois proceeding. Insofar as those rules are concerned, all that the Act and the regulations of the Secretary do is to define the area in which the Board may provide standards for warehouses whose receipts are acceptable in satisfaction of futures contracts. By the terms of § 5a

[4] We therefore have no attempt here to endow private groups with law making functions." Cf. *Schechter Corp.* v. *United States*, 295 U. S. 495; *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 225-227; *Parker* v. *Brown*, 317 U. S. 341, 350-352.

(7) the requirements fixed by the Board must be "reasonable" and they must relate to "location, accessibility, and suitability for warehousing and delivery purposes." If the Board transcends those bounds, it violates the Act. See § 6b. But within that area it has considerable discretion.[5]

Hence it seems to us that no action of the Illinois Commission within the zone where the Board has freedom to act would contravene the federal scheme of regulation.[6] It would be quite a different matter if the Illinois Commission adopted rules for the Board which either violated the standards of the Act or collided with rules of the Secretary. But such collision is not necessary; and we cannot assume that the Illinois Commission will take any action which in any way impairs the federal regulatory scheme.

There is other intrinsic evidence that Congress did not preclude state regulation which supplements or bolsters the federal scheme. Sections 4b and 4c of the Act make unlawful a variety of fraudulent and deceptive practices on contract markets. And § 4c provides that "nothing in this section or section 4b shall be construed to impair any State law applicable to any transaction enumerated

[5] In the present proceeding the question of the validity of the existing rules and regulations of the Board of Trade under the Commodity Exchange Act is not in issue, and we intimate no opinion upon it.

[6] It is suggested that the regulations of the Board of Trade or those which the Illinois Commerce Commission may impose on it are automatically invalid insofar as they relate to warehouses. For in *Rice* v. *Santa Fe Elevator Corp.*, *supra*, we have held that the United States Warehouse Act excludes all state regulation, no matter how complementary, of those subjects touched by the federal regulatory scheme. But the situation here is quite different. In the first place, we are dealing with a measure of regulation over warehouse receipts not federal warehousemen; and the regulations which the Board of Trade is authorized to formulate do not carry civil or criminal sanctions. In the second place, Congress by granting the Board of Trade freedom to regulate within this narrow field has by that very act negatived any inference that the Federal Government has preempted it by requirements of its own.

or described in such sections." These fraudulent practices, or many of them, have long been the occasion for the exercise by the States of their historic police powers. Federal regulation in those fields would therefore almost certainly conflict with state laws. Thus the provision in § 4c serves the function of preventing supersedure and preserving state control in two areas where state and federal law overlap. Where Congress used such care to preserve specific state authority, even when it duplicated federal regulation, it is a fair inference not only that supersedure was to take its natural course where rights not saved to the States were involved, *First Iowa Hydro-Electric Coop.* v. *Federal Power Commission*, 328 U. S. 152, 175, but also that non-conflicting state authority was left undisturbed. Moreover the provision in § 12 of the Act that the Secretary "may cooperate with any department or agency of the Government, any State . . . or political subdivision thereof" supports the inference that Congress did not design a regulatory system which excluded state regulation not in conflict with the federal requirements. See *Townsend* v. *Yeomans*, 301 U. S. 441, 454; *Union Brokerage Co.* v. *Jensen*, 322 U. S. 202, 209.

Respondents' claim of supersedure is, therefore, premature. Until it is known what rules the Illinois Commission will approve or adopt, it cannot be known whether there will be any conflict with the federal law. Any claim of supersedure can be preserved in the state proceedings. And the question of supersedure can be determined in light of the impact of a specific order of the state agency on the Federal Act or the regulations of the Secretary thereunder. Only if that procedure is followed can there be preserved intact the whole state domain which in actuality functions harmoniously with the federal system. For even action which seems pregnant with possibilities of conflict may, as consummated, be wholly barren of it.

Reversed.